



Office of the Attorney General

State of Texas

September 8, 1992

DAN MORALES
ATTORNEY GENERAL

Mr. Richard D. Monroe
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg.
125 East 11th Street
Austin, Texas 78701-2483

OR92-530

Dear Mr. Monroe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 16987.

The Texas Department of Transportation (the "department") received a request for "all environmental assessments, reports and test[] results taken or conducted on the property described as 10611 Research Boulevard, Austin, Texas." The department is seeking to acquire this property for the purposes of road construction on U.S. Highway 183, and an award was made by a Special Commissioner's Hearing. You have submitted for our review a document that you contend is "arguably responsive" to the request; however, you object to disclosing this report and claim exemption from public disclosure under sections 3(a)(3) and 3(a)(5) of the Open Records Act.

Section 3(a)(3), the "litigation exception," excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

V.T.C.S. art. 6252-17a, § 3(a)(3).

Previous open records decisions issued by this office resolve your request. Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 555 (1990). The exception forces parties to a lawsuit to obtain relevant information through discovery, if at all. Open Records Decision No. 551 (1990). "Litigation" encompasses proceedings conducted in quasi-judicial forums as well as in strictly judicial ones. Open Records Decision No. 301 (1982); *see* Open Records Decision Nos. 410 (1984) (hearings of an appraisal review board may be excepted by section 3(a)(3) where the tapes contain information regarding specific properties involved in litigation); 311 (1982) (section 3(a)(3) properly invoked when governmental body seeking to acquire an easement through good faith negotiations may have to resort to condemnation proceedings); *see also* Open Records Decision No. 556 (1990) (section 3(a)(3) may be applied to records relating to a contested case before an administrative agency).

We have considered the section 3(a)(3) exception that you claim. You advise this office that the award from the Special Commissioner's Hearing is on appeal to a judicial forum. Accordingly, we conclude that litigation may be reasonably anticipated or pending. Furthermore, having examined the report at issue, we conclude that it is related to the anticipated or pending litigation. Consequently, unless the requested information on the property has been previously disclosed to the requestor, *e.g.*, through discovery or by court order, you may withhold the report from required public disclosure under section 3(a)(3) of the Open Records Act. Please note that this ruling applies only for the duration of the litigation at issue and to the report at issue here. Since we resolve this issue under section 3(a)(3) of the act, we need not address the applicability of section 3(a)(5) at this time.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with

a published open records decision. If you have questions about this ruling, please refer to OR92-530.

Yours very truly,

A handwritten signature in black ink, reading "Kimberly K. Oltrogge". The signature is fluid and cursive, with the first name "Kimberly" and last name "Oltrogge" clearly legible.

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee

KKO/HJ/lmm

Ref.: ID# 16987

cc: Mr. Donald H. Grissom
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